

3

No. 08-1117

FILED

MAY 28 2009

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

---

IN THE  
*Supreme Court of the United States*

---

SCOTT DAVID BOWEN,

*Petitioner,*

v.

STATE OF OREGON,

*Respondent.*

---

On Petition for a Writ of Certiorari to the  
Oregon Court of Appeals

---

**BRIEF OF *AMICUS CURIAE* OREGON  
CRIMINAL DEFENSE LAWYERS  
ASSOCIATION IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI**

---

Rankin Johnson IV  
Counsel of Record  
Chair, Oregon Criminal  
Defense Lawyers  
Association Amicus  
Committee  
714 SW 20<sup>th</sup> Place  
Portland, OR 97205  
(503) 274-4394

## TABLE OF CONTENTS

Interest of Amicus Curiae .....	1
Summary of Argument .....	1
Argument .....	3
Conclusion .....	9

## TABLE OF AUTHORITIES

### Cases

<i>Johnson v. Louisiana</i> , 406 US 356, 381 (1972) .....	8
<i>State ex rel Smith v. Sawyer</i> , 263 Or 136, 138, 501 P2d 792 (1963).....	5

### Statutes

Or. Rev. Stat. §136.450.....	5
Or. Rev. Stat. § 136.210.....	5

### Other Authorities

<i>On the Frequency of Non-Unanimous Felony Verdicts in Oregon, Report to the Oregon Public Defense Services Commission</i> (May 21, 2009). .....	4
---	---

## **Interest of Amicus Curiae<sup>1</sup>**

Amicus Curiae, Oregon Criminal Defense Lawyers Association, ("OCDLA") is a 1,281-member organization of attorneys, investigators and others engaged exclusively or primarily in criminal defense. OCDLA represents the interests of its members, the criminal defense bar, and criminal defendants, and provides education and training on criminal defense law and practice.

### **Summary of Argument**

In all federal courts and 48 states, a verdict in a criminal prosecution must be unanimous. That is not the case in Oregon and Louisiana. Scott David

---

<sup>1</sup> The parties have consented to the filing of this brief.

Counsel of record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Bowen was convicted of eight serious sexual offenses by a jury vote of ten to two. He was sentenced to seventeen years in prison.

The state's case was based on the testimony of the victim, Mr. Bowen's fifteen-year-old runaway daughter. Because the verdict did not need to be, and was not, unanimous, the state's burden was easier to meet in this case than it would have been if Mr. Bowen had been charged with misdemeanors such as trespassing or disorderly conduct. Unlike the serious felony charges in this case, a misdemeanor requires the unanimous decision of a six-person jury to return a conviction.

OCDLA asks the Court to grant the writ of certiorari sought by Mr. Bowen, and to rule that a verdict in a criminal case must be unanimous. OCDLA joins in Mr. Bowen's arguments as to why this issue is appropriate for review by the Court, and why the Sixth Amendment right to a jury trial includes the right to a unanimous jury trial.

OCDLA, in filing this brief, has two additional points to add. First, to the extent that data is

available, most felony verdicts in Oregon are nonunanimous. Second, nonunanimous jury verdicts tend to reduce the state's burden at trial. The lowered burden means that a weak state's case is more likely to result in a verdict in a felony case than in a misdemeanor; in other words, an innocent person accused of a felony is in more jeopardy than an innocent person accused of a misdemeanor.

### **Argument**

Although the available data are limited, it appears that roughly two-thirds of Oregon felony trials resulted in non-unanimous verdicts. That is troubling, because convictions as a result of non-unanimous verdicts are also the result of a lower burden on the prosecution than the Bill of Rights imposes, and a lower burden than exists in federal courts and in 48 states.

Oregon does not keep systematic records of whether jury verdicts are unanimous. The Oregon Office of Public Defense Services ("OPDS"), which handles most of the state's indigent-defense appeals and administers the appointment of counsel in the

remainder, has compiled statistics from those felony cases which pass through that office.

662 felony appeals were referred to OPDS in 2007 and 2008, representing slightly less than half of the felony trials in Oregon during that time. The record reveals the jury's vote in 63% percent of those cases. Where the vote is known, the jury's verdict was nonunanimous 66% of the time. Three percent of cases resulted in hung juries. *On the Frequency of Non-Unanimous Felony Verdicts in Oregon, Report to the Oregon Public Defense Services Commission* (May 21, 2009). The report is also available online: <http://www.ojd.state.or.us/osca/opds/Reports/documents/PDSCReportNonUnanJuries.pdf> (last visited May 26, 2009.)

Of course, those are only the cases in which the defendant was convicted. Counsel for amicus believes, from speaking with other Oregon attorneys, that the percentages are comparable for acquittals, but the only available evidence is anecdotal and casual.

The nonunanimity requirement is significant because so many jury verdicts are, in fact, unanimous, and it is objectionable because it reduces the state's burden to prove its case. The Oregon constitutional provision permitting 10-vote verdicts in felony cases was adopted in 1934 by initiative. In construing that provision, the Oregon Supreme Court has held that, "[i]t clearly appears from the argument in the Voters' Pamphlet that the amendment was intended to make it easier to obtain convictions." *State ex rel Smith v. Sawyer*, 263 Or 136, 138, 501 P2d 792 (1963). In *Sawyer*, a felony criminal defendant sought a misdemeanor jury and a unanimous verdict.<sup>2</sup> In denying his request, the Oregon Supreme Court reasoned that the ten-person verdict in a felony case was an easier burden for the state than the unanimous six-person verdict the defendant sought.

---

<sup>2</sup> Under Oregon law, a felony jury is twelve people and ten must agree to reach a verdict. Or. Rev. Stat. § 136.210, Or. Rev. Stat. §136.450. A misdemeanor jury is six people, and must be unanimous. *Id.*

It is not obvious at first glance that getting ten votes out of twelve would be easier than six votes out of six, but a simplified model of a jury's deliberation helps to illustrate the point. In this model, each juror will vote to convict 90 percent of the time, and the juror's votes are independent of one another. In spite of the obvious limitations of this model, it illustrates a significant difference between unanimous and non-unanimous juries.

Under this model, the likelihood of a particular verdict can be expressed as a problem of binomial probability. See [http://en.wikipedia.org/wiki/Binomial\\_probability](http://en.wikipedia.org/wiki/Binomial_probability). (last visited on May 25, 2009). A binomial probability is the probability of a series of independent events, each of which has two outcomes.

Using binomial probability, the chance of a guilty verdict in a misdemeanor case is easy to calculate; it is 0.9 (the chance that an individual juror will vote to convict) raised to the power of six (the number of jurors.) That works out to 0.53, or a fifty-three percent chance of a guilty verdict. Most of



the remaining outcomes would be a hung jury; under this model the likelihood of an acquittal would be 0.1 to the sixth power, or 0.000001 percent.

However, the likelihood of a guilty verdict in a felony case is higher. Although ten votes are required to reach that verdict, there are twelve jurors voting. The chance of a guilty verdict works out to 89 percent.<sup>3</sup>

---

<sup>3</sup> Here is an abbreviated explanation of how to calculate the chance of a guilty verdict under this model. The chance of such a verdict is the sum of the chances of exactly zero votes to acquit plus the chance of one vote to acquit plus the chance of two votes to acquit. Any other number of acquittal votes is an acquittal or a hung jury.

The chance of zero votes to acquit is 0.9 (the chance of a vote for a conviction) raised to the twelfth power, (the number of jurors.) That's about 0.28, or 28 percent. (Probabilities are usually expressed as a fraction of one.)

The chance of exactly one vote to acquit is 0.1 (the chance of a vote for an acquittal) times 0.9 (the chance of a vote for a conviction) raised to the eleventh power, (the number of jurors voting to convict.) times twelve (the number of unique ways to divide the jury into one acquitting juror and eleven convicting jurors). That's about 0.37.

Obviously, the chance that a juror will vote to convict will depend on the juror's view of the other evidence in the case, the deliberative process, and any number of other things. But the model above supports the Oregon Supreme Court's holding in *Sawyer* that, under Oregon law, the state's burden is lighter in a felony case than a misdemeanor. *See also Johnson v. Louisiana*, 406 US 356, 381 (1972) (Douglas, J., dissenting) (observing that nonunanimous verdicts reduce the state's burden. By eliminating the voice of dissenting jurors, Oregon has also undermined the reliability of its jury verdicts.

---

The chance of exactly two votes to acquit is 0.1 (the chance of a vote for an acquittal) raised to the second power (the number of jurors so voting) times 0.9 (the chance of a vote for a conviction) raised to the tenth power, (the number of jurors voting to convict) times sixty-six (the number of unique ways to divide the jury into two acquitting jurors and ten convicting jurors). That's about 0.23.

The three possibilities, added together, make about 0.89, or 89 percent.

## **Conclusion**

For the above reasons, and those in Mr. Bowen's petition for a writ of certiorari, OCDLA urges the Court to grant the writ of certiorari requested by Mr. Bowen, and to decide that the Sixth Amendment's right to a jury trial includes the right to a unanimous jury verdict.

Respectfully Submitted,

Rankin Johnson IV  
Counsel of Record  
Chair, Oregon Criminal Defense Lawyers  
Association Amicus Committee  
714 SW 20th Place  
Portland, OR 97205  
(503) 274-4394